



March 30, 2020

The Honorable Leigh Saufley
Chief Justice of the Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04101-4125

The Honorable Robert Mullen
Chief Justice of the Maine Superior Court
Cumberland County Courthouse
205 Newbury St, Room A260,
Portland, Maine 04101

The Honorable Susan Sparaco
Chief Judge of the Maine District Court
163 State House Station
Augusta, ME 04333

The Honorable Jed French
Deputy Chief Judge of the Maine District Court
205 Newbury Street, First Floor
Portland, ME 04101

RE: COVID-19 Response in Jails and Prisons

Dear Chief Justice Saufley, Chief Justice Mullen, Chief Judge Sparaco, and Deputy Chief Judge French:

This letter is to commend and thank you for your expeditious action in responding to the COVID-19 pandemic in recent weeks. The Court's quick actions in

vacating arrest warrants for fines and fees, and extending time to pay such fines—to list only a small sample—served as an example to other courts nationwide. We also appreciate the Court’s concerted efforts to act quickly on bail motions to reduce the pretrial population.

In light of the fast pace of the COVID-19 crisis, this letter also seeks to offer several additional areas in which the Court’s supervision and guidance are necessary. As the Court already knows, it is impossible to protect our communities from the COVID-19 pandemic without addressing the risks in our jails and prisons. The attached statements from public health experts Dr. Lani Graham and Dr. Sharon McDonnell explain these risks in further detail. In recognition of these risks, criminal defense attorneys, prosecutors, and judges have made great strides in achieving pretrial release across the state. According to data provided by the Maine Department of Corrections, the average jail population in Maine decreased by approximately 20% between March 9 and March 24, 2020. We expect that population to further decrease as the days and weeks go on.

Yet more is needed. Despite this progress, there remain significant regional differences in pretrial release, reflecting the need for more guidance and transparency from the courts. Specifically, in furtherance of its authority to oversee courts and litigants, we recommend that the Court take the following steps:

- (1) In setting bail procedures, order that the risks of COVID-19 generally require courts to order release on personal recognizance bail absent a specific countervailing risk to community safety,
- (2) Require disclosure of information regarding the existing jail population,
- (3) Suspend all probation or pretrial conditions whose adherence would require the individual to violate guidelines on physical distancing, and

- (4) Appoint a special master to oversee the release of inmates whose incarceration poses an unnecessary risk of infection to themselves, facility staff, and the community at large.

First, regarding procedures for setting bail, the Court should make clear by temporary rule, emergency order, or other guidance, that the dangers of COVID-19 require release on personal recognizance absent a specific countervailing danger to the community.¹ *See, e.g.*, Me. R. Crim. P. 46. Such a standard is necessary to take account of the well-known risk that unnecessary incarceration poses to the community as a whole, as described by Dr. Graham and Dr. McDonnell. “It is the purpose and intent of [the Maine Bail Code] that bail be set for a defendant in order to . . . reasonably ensure the integrity of the judicial process and, when applicable, to *reasonably ensure the safety of others in the community.*” 15 M.R.S. § 1002 (emphasis added); *see also* 15 M.R.S. § 1026(4)(C)(9-A). Unnecessary pretrial incarceration poses serious risks of community harm, not least the rapid spread to inmates and resulting overcrowding of community hospitals. It also risks the spread of infection to staff who travel to and from the facility each day.

In light of these systemic risks to the defendant and the community, the Court should order that courts and bail commissioners must generally grant release on personal recognizance (PR bail) during this state of emergency. In amending

¹ Such authority is vested in the Maine Supreme Judicial Court, 4 M.R.S. §§ 7, 8, 9 (providing authority over rule-setting, records, and other action “necessary for the furtherance of justice or the execution of the laws”), the Chief Justice of the Superior Court, 4 M.R.S. § 101-A (providing authority over the “operation of the Superior Court”), and the Chief Judge of the District Court, 4 M.R.S. § 164 (providing authority over the “operation of the District Court”).

bail, likewise, the COVID-19 pandemic creates changed circumstances that require amending to PR bail absent specific countervailing risk to the community.²

Second, to ensure a system that is responsive to the ever-changing dangers of the pandemic, the court should issue an emergency order to release information regarding existing jail populations. Although a great deal of progress can be made through case-by-case advocacy, the mortal threat to our communities is system-wide and requires broader coordination and transparency to protect defendants and the community from harm. In this new reality, the degree of risk can change dramatically by the day.³ In the absence of a single public defender in Maine, the Maine Commission on Indigent Legal Services and the Maine Association of Criminal Defense Lawyers must have the information necessary to represent the systemic needs of the people they represent.⁴ Public health advocates and attorneys

² Given the daily (and often hourly) changes in the spread of the COVID-19 virus, such ongoing changes should also qualify as “changed circumstances” under 15 M.R.S. § 1026(3)(C). Many judges have effectively adopted these procedures in practice, but guidance from the Court is crucial to ensure fairness across the entire state.

³ In New Orleans, nine health workers and staff recently tested positive for the coronavirus, placing inmates and the community at risk of infection. *Coronavirus and Orleans Parish Jail: workers test positive; inmates’ tests pending*, WDSU News (Mar. 25, 2020), available at <https://www.wdsu.com/article/coronavirus-and-orleans-jail-6-workers-test-positive-inmates-tests-pending/31932626#>. At Rikers Island Jail in New York City, “[e]very day, more [correctional officers] and more inmates are testing positive.” *Anticipating COVID-19 Outbreaks, Rikers Island Offers Warnings for U.S. Jails, Prisons*, TIME (Mar. 24, 2020), available at <https://time.com/5808020/rikers-island-coronavirus/>.

⁴ MCILS has authorized lawyers to represent post-conviction inmates in pursuing release, further confirming the need for information about both the pre-trial and post-trial populations. *See Request for Early Release Form, Me. Comm’n on Indigent Legal Servs.* (Mar. 26, 2020), available at

from the American Civil Liberties Union of Maine, likewise, have specialized knowledge and insight that can help to manage systemic risks—but only if they have access to crucial information.

Some regions in the state have tackled this reality by ensuring access to information between prosecutors and defense counsel. Crucial information includes data about the incarcerated population, including:

- Data on any COVID-19 testing and results for inmates and jail staff,
- Total Number of Pre-Trial Detainees, including, for each detainee:
 - Name,
 - Date of Birth,
 - Charges,
 - Defense Attorney,
 - Date into Facility,
 - Bail Amount, and
- Total number of people in execution of sentence, including
 - Name
 - Date of Birth
 - Charges
 - Defense Attorney
 - Date into Facility
 - Date to be Released

By statute, the Court has access to information “on the pretrial detention population in the jail,” 15 M.R.S. § 1662(3), and should make that information public. It is our understanding that the Sheriffs and/or jail administrators send this information to the courts every other week. Additionally, jail administrators have made similar information available to prosecutors in certain districts, and we ask that the Court require sharing of such information. In these extraordinary times, additional information is necessary to protect all members in our community.

<https://www.maine.gov/tools/whatsnew/index.php?topic=MCILS-News&id=2289616&v=article>.

Third, just as the Court vacated warrants of arrest for nonpayment of fines and fees—which posed an unnecessary risk of exposure to the virus in jail—the Court should also suspend conditions of release and probation that are at odds with the mandate for physical distancing. Common examples of such conditions include mandatory in-person drug testing, mandatory employment, mandatory attendance at educational and other programs, and random searches. Each of these conditions requires people to violate the directives for physical distancing. Moreover, under the latest state guidance ordering the closure of most non-essential businesses in the state, complying with these conditions may be impossible. Nobody should be arrested for violating conditions that place them in danger, or that are impossible to follow.⁵

Finally, in these extraordinary times, incarceration—whether pretrial or post-conviction—may violate the Fourteenth Amendment due process guarantee or the Eighth Amendment prohibition against cruel and unusual punishment. Indeed, the risk of contracting “serious contagious diseases” may constitute an “unsafe, life-threatening condition” in violation of the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *see also Hutto v. Finney*, 437 U.S. 678, 682-685 (1978) (recognizing the need for a remedy where prisoners were crowded into cells and some had infectious diseases). Courts across the country have already created

⁵ We understand that Department of Corrections and Maine Pretrial Services have transitioned to reporting by phone, video chat, and email. Guidance from the Court remains important to ensure fairness across the entire state.

processes for efficient and widespread review of such dangers.⁶ With the dramatic daily increases in risk and need for system-wide action, we ask that the Court appoint a special master, active retired justice, or associate justice to oversee an orderly response to the serious risks in our jails and prisons.

We would happy to make ourselves available to discuss these proposals.

Thank you for your time and consideration, and for your expeditious action to protect the people of Maine.

Respectfully,

/s/ Tina Heather Nadeau

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⁶ See, e.g., New Jersey Supreme Court, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, available at <https://njcourts.gov/notices/2020/n200323a.pdf?c=G7G> (last visited Mar. 23, 2020); see also *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, Massachusetts SJC Docket No. SJ-2020-0115 (appointing an Associate Justice to oversee a petition seeking (among other things) release for post-conviction inmates “who are vulnerable to COVID-19, near the end of their sentence, or who do not pose a threat to the public”).

Copied (by email):

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